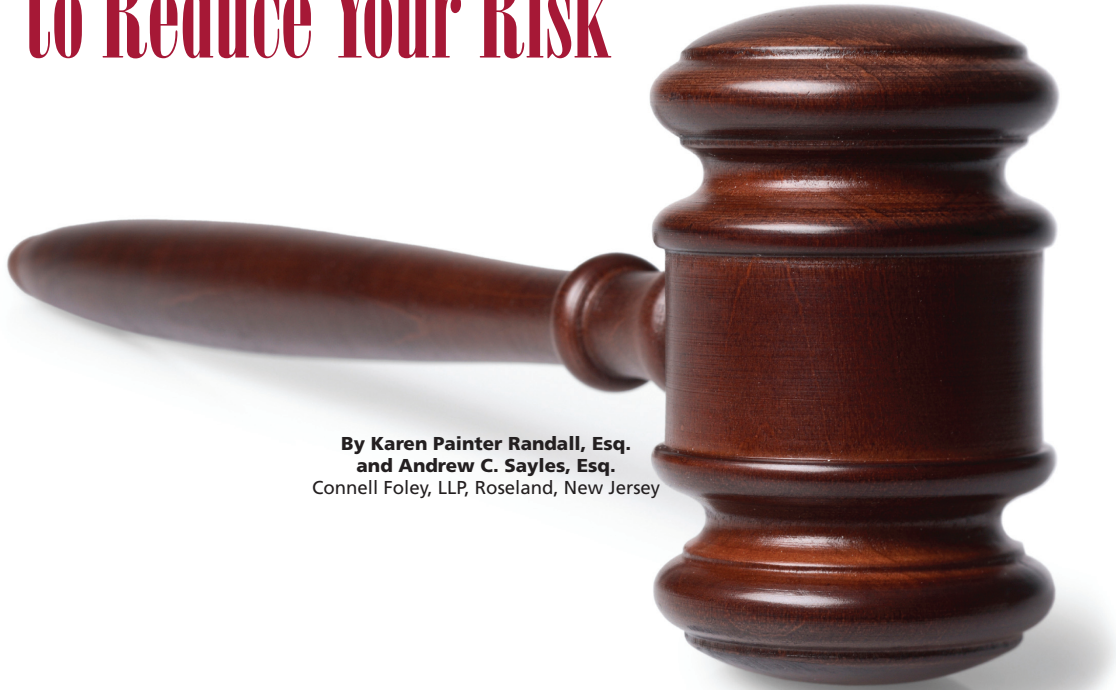


MISTAKES THAT LEAD TO MALPRACTICE

Common Sense Approaches to Reduce Your Risk



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Legal malpractice claims are an inherent risk of doing business for lawyers in every jurisdiction. In 2005, an American Bar Association study showed that each year attorneys have a 4 to 17 percent chance of being sued for legal malpractice, depending on their jurisdiction and type of practice. While personal injury cases lead the field in malpractice claims, accounting for about 30 percent of all claims, all lawyers, regardless of practice, are at risk for malpractice claims. And while these surprise attacks are never anticipated, there are steps you can take to prevent or reduce your chances of facing a malpractice suit.

CLIENT TYPES AND TEMPERAMENTS

Malpractice claims often arise from a combination of a weak case and unrealistic client

expectations regarding the anticipated outcome. Lawyers must be clear with their clients, outlining both the methods of communication and resultant work product, but also in managing the client's expectations of results.

Some clients are more emotionally invested and feel they were severely wronged. Even in business cases, the feeling is "this is personal." They expect damages and recovery beyond what the facts support. It is these clients that lawyers must carefully examine. These are the clients more likely than not to turn on their former advocates.

Attorneys must not only vigilantly assess the case, they must also pay attention to the client's temperament and state of mind. Keep a watchful eye out for the following factors:

- Past litigation history;
- Type of claim — a client will-

ing to sue another professional may also be willing to sue his attorney;

- If other attorneys have declined to take the case or terminated representation;
- Argumentative or confrontational demeanor;
- An unwillingness to listen to the advice they've sought.

Any of these factors should cause pause and reconsideration. If you choose not to represent a prospective client, a non-engagement letter should be sent quickly to nullify any subsequent claims.

CLEAR AND CONSISTENT COMMUNICATION

Many malpractice claims arise out of communication gaps and gaffes. Make sure early that your client understands your firm's communication protocol and that you understand your

client's expectations for communication. Communication expectations must be established and managed on both sides of the case equation. Well-crafted engagement letters should outline and reinforce the communication procedures and processes you will follow in a case. Further, they should include comprehensive descriptions of your scope of services, including what you will and will not provide, billing system, fees, hourly rates of all individuals on the case, and the right to dispute legal fees — all need to be included in your engagement letter.

Client updates are imperative and should document, at regular intervals, the strategy, procedures, progress, problems, settlement offers, conferences, and, if necessary, options for appeal. All decisions and conversations should also be recorded in memos or letters to the client.

CASE SELECTION

Malpractice claims arise more frequently in small law firms, but larger firms are certainly not immune. In litigation outside your legal expertise, where multiple parties are involved, the risk of malpractice increases exponentially, even for the most diligent attorneys. One of the first steps any lawyer must take before accepting a case is to comprehensively assess the proposed case to identify the issues, theories and discovery demands anticipated over the course of the representation. This should also take into account the demands of an attorney's existing case load. Clearly, such an assessment will be more difficult and less accurate for an attorney practicing outside his field of specialty.

While taking that big case with unlimited fee and prominence potential may be intoxicating, attorneys must be circumspect and highly sensitive to taking on work that is outside of either their or their firm's competencies.

SCHEDULING

Even attorneys working a case within their area of expertise risk malpractice through missed deadlines. Before taking a case, attorneys must evaluate their entire caseload, including time restraints and available resources. When attorneys or staff members are overextended, missed deadlines grow in prevalence. Similarly, busy lawyers can also fail to fully explore a case and all the aspects at play. Missed deadlines and insufficient pre-case analysis are two of the leading causes of malpractice actions and smart attorneys must avoid those traps.

Many missed deadlines are caused by an inadequate calendaring system. To ensure you

never miss a critical deadline, maintain an active calendaring system and regularly assess your files. There are many file management systems currently on the market, and they can mitigate missed deadlines.

CONFLICTING INTERESTS

Un-checked conflicts can also set the stage for a malpractice claim. Conflict checks should be repeatedly and routinely performed prior to meeting a prospective client, as a condition of representation, and when a new party is added to a case.

The Rules for Professional Conflict contain multiple provisions addressing conflicts of interest. Although a violation of the RPC does not establish legal malpractice per se, many jurisdictions will admit proof of a violation to help establish such a claim. Further, many courts across the nation have held that an attorney is not entitled to payment for services rendered while a conflict of interest existed.

Conflict systems can significantly reduce your chances of stepping into this perilous situation. If a potential conflict is found, an attorney should advise the client of it without delay. The attorney should also recommend that the prospective client seek advice from separate counsel. You will need to carefully examine the clients and cases to determine if representation of multiple clients will impact your ability to fairly represent each client. Confirm that the representation is not in violation of any existing laws or regulations, and review the anticipated claims of the case to ensure that the clients are not in a position to assert claims against one another. In the event each of these factors is addressed, informed consent must be obtained from the client, in writing, as to the representation and potential for conflict.

CLAIMS FROM NON-CLIENTS

In many transactional cases, it is possible for third parties, especially those not represented by counsel, to assert and maintain reliance-based claims upon an attorney's representations. The most telling example of this occurs in estate planning. Over the past two decades, many states abandoned the "strict privity" rule and now permit non-client beneficiaries to bring malpractice actions against an estate planning attorney. In most instances, the attorney has never met or interacted with these non-client plaintiffs. Therefore, the attorney must not only be mindful of the interests of the

client-testator, but also of potential non-client beneficiary interests that can put him and his client at risk.

To avoid claims by non-clients, it is essential to identify to whom a fiduciary duty is owed and any parties that may reasonably rely on your conduct. Where such duties to non-clients exist, document the file by confirming the specific requests and interests of your client. Moreover, do not undertake tasks on behalf of non-clients, such as the preparation of forms or filing of papers. This will create duties to the non-client without the protections afforded through formal client relations such as the Retainer Agreement, Letter of Engagement or similar protection letters.

FEE DISPUTES

While fees should have been discussed and agreed upon at the outset, issues concerning the non-payment of legal fees may arise. Consistent and detailed billing procedures that include internal protocols to address, at an early stage, outstanding invoices with clients, can reduce or even sidestep fee disputes.

But, when a client does initiate a fee dispute, as a general rule, attorneys and law firms should avoid a fee-related law suit. The costs to the firm can far exceed the actual fee amount, once non-billable time demands and the impact on insurance premiums are factored in. Before making a decision to act, law firms should conduct a cost-benefit analysis to assess the costs of defending a legal malpractice claim.

Malpractice claims for lawyers are a very real risk, as the data asserts, but there are many steps lawyers can take to significantly reduce the potential that they will be involved in a malpractice claim. Many avoidance strategies are common sense — managing the expectations of your clients, communicating clearly and regularly, focusing on your core competencies, and realistically assessing your case load, chief among them. Applying the same circumspection and precision at the case evaluation stage as you apply during them can go a long way in keeping malpractice claims at bay.

Although a violation of the RPC does not establish legal malpractice per se, many jurisdictions will admit proof of a violation to help establish such a claim.



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